COURT OF APPEALS
DECISION
DATED AND RELEASED

April 16, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-2855-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

CHRISTOPHER C. VERTZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Reversed.*

BROWN J. The State appeals from an order suppressing drug-related evidence gathered by two park rangers during their questioning of the defendant, Christopher C. Vertz. The trial court found that Vertz was in custody during this questioning and therefore suppressed the evidence because the rangers did not give Vertz the ***Miranda***[1] warnings.

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[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

We agree with the State, however, that the rangers were conducting a ***Terry***[2] stop. Moreover, since this ***Terry*** stop did not trigger the warning requirement, we reverse the suppression order.

The facts are not in dispute. The only witness at the evidentiary hearing was the ranger who arrested Vertz, Officer Deborah Goeb of the Department of Natural Resources. She testified as follows.

On September 3, 1995, Vertz and several friends were camping at Bong State Recreational Area in Kenosha county. Goeb and another ranger were on foot patrol and approached these campers to quiet them down. The rangers identified themselves as they neared the site. When Goeb arrived, she saw two marijuana joints and a baggie of marijuana on a picnic table. Goeb also saw Vertz hide the two joints behind his back.

The baggie still remained on the table, however, so Goeb picked it up and smelled the contents to confirm that it was marijuana. She asked all of the campers who owned the drugs, but no one said anything. Goeb then asked Vertz to give what he had in his hand to the other ranger. She also looked into a truck parked near the site and saw what she thought was cocaine on the seat.

Goeb then asked the campers if there were "any more drugs on the site." Again, Goeb received no response. She also asked the campers if they owned the tents at the site.

Vertz answered that he owned one of them and Goeb asked for his permission to look inside. He agreed. While Goeb and Vertz were walking

[2] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

toward the tent, Vertz told Goeb: "There's cocaine in the tent. Let me show you were it's at." He then opened the tent for Goeb, pulled away some garments and uncovered the cocaine. Vertz also admitted to Goeb that it was his.

Goeb then asked for Vertz's permission to search his vehicle. He again agreed. There, Goeb found more marijuana and some drug paraphernalia. After the vehicle search, Goeb placed Vertz under arrest.

Goeb also testified that she had no difficulty communicating with Vertz during this encounter. And while Goeb believed that Vertz had been drinking, she did not think he was intoxicated. Overall, she described Vertz as being "very cooperative."

On cross-examination, however, Vertz's trial counsel elicited from Goeb that she and the other ranger never gave Vertz the ***Miranda*** warnings. And while Goeb did not formally arrest Vertz until after she searched his tent, she admitted that she "would have asked him to stay" if he had tried to leave. Goeb explained that even though she and the other ranger had discovered the marijuana, "[W]e wanted to ask who it belonged to. It may not have been Mr. Vertz's."

The State subsequently charged Vertz with separate counts of possession of marijuana and possession of cocaine. Although Vertz pled guilty to the marijuana charge, he moved to suppress the cocaine that the rangers seized from the site as well as his statements about the cocaine.

The trial court granted the motion. It found that Vertz was in custody after the rangers seized the marijuana joints from him. The court reasoned that this event turned the situation into a "custodial setting" and thus the rangers should have given Vertz his ***Miranda*** warnings at that point. The State appeals.

We owe no deference to the trial court's reasoning. This case involves the application of constitutional principles to a set of undisputed facts. We decide such questions independently of the trial court. *See* ***State v. Esser***, 166 Wis.2d 897, 904, 480 N.W.2d 541, 544 (Ct. App. 1992).

As the State has the burden of showing that the rangers' conduct was proper under the Fourth Amendment, we will begin with its justification for what occurred at the campsite. *See* ***State v. Washington***, 120 Wis.2d 654, 663, 358 N.W.2d 304, 308 (Ct. App. 1984), *aff'd*, 134 Wis.2d 108, 396 N.W.2d 156 (1986).

The State contends that the rangers were engaged in a ***Terry***-like investigatory stop. *See* ***Terry v. Ohio***, 392 U.S. 1, 22-23 (1968). Although the State's argument before the trial court focused on whether this search and questioning were conducted in a "custodial setting," *see* ***Rhode Island v. Innis***, 446 U.S. 291, 299-301 (1980), at oral argument the State explained that it originally viewed this situation as a ***Terry*** stop, and simply molded its argument to fit how the trial court was viewing the case.[3] On appeal, however, the State reasserts that ***Terry*** controls.

We agree. In ***Terry***, the Supreme Court upheld the conduct of a police officer who stopped and questioned three individuals whom he suspected were planning a robbery. *See* ***Terry***, 392 U.S. at 22-23. The decision stands for a principle that a law enforcement officer, even without probable cause to arrest,

[3] Our review of the record confirms that the State presented its ***Terry*** theory to the trial court. At the beginning of argument in the trial court, the State objected to Vertz's claim that the campsite was a "custodial setting." The State argued that it was a "temporary detention," like "traffic stops and other matters."

may temporarily stop and investigate suspicious activity. *See* ***id.*** at 22; *see also* § 968.24, STATS. (authorizing temporary questioning without arrest).

Here, the rangers were "on the beat" at the park and therefore justifiably approached the campers to quiet them down. *See* ***Terry***, 392 U.S. at 20. When the rangers arrived, they saw signs of criminal activity—the marijuana. The rangers could not, however, be certain who among the campers the drugs belonged to.

The rangers accordingly began an investigation. Goeb looked around the campsite and into nearby vehicles to see if other contraband was in "plain view." *See generally* ***Coolidge v. New Hampshire,*** 403 U.S. 443, 465 (1971). More significant to this appeal, the rangers started asking questions to see who might own the drugs. Although Vertz was not permitted to leave during this questioning, as we explained above, the Supreme Court has condoned such *stops* for investigatory purposes. *See* ***Terry***, 392 U.S. at 22; *see also* § 968.24*,* STATS. ("[A] law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person ... has committed a crime."). We conclude that the questioning of Vertz, and the evidence and statements that this questioning led to, were all properly gathered as part of a ***Terry***-like investigatory stop.

Vertz contends, however, that while this police contact may have started as a ***Terry***-like stop, it evolved into a ***Miranda***-like custodial interrogation. He contends that since Goeb did not receive a satisfactory response about which members of the group owned the drugs, she focused all of her attention on him because he had the marijuana joints in his hand. He further complains that the

investigation became custodial once he was taken from the group to have his tent searched.

We reject this view of the facts. We acknowledge that a ***Terry*** stop can sometimes evolve into a custodial situation. Indeed, this is what happened in ***State v. Pounds***, 176 Wis.2d 315, 500 N.W.2d 373 (Ct. App. 1983). There, the defendant was originally stopped because he was riding in a car with invalid plates. The police soon told the defendant that he was free to leave. But when the police later found a weapon in the car, a state trooper was sent to locate the defendant. When the trooper found him in a nearby restaurant, the trooper ordered him to the floor at gunpoint. The trooper then frisked the defendant, handcuffed him, and transported him back to the traffic stop. *See* ***id.*** at 321-22, 500 N.W.2d at 376. Under those circumstances, we held that the original ***Terry***-like traffic stop turned into a custodial situation which demanded that the defendant be given the ***Miranda*** warnings. *See* ***Pounds***, 176 Wis.2d at 321, 500 N.W.2d at 376. We therefore suppressed the statements that the defendant made during the questioning that occurred when he was taken back to the traffic stop.

Moreover, in ***Pounds,*** this court adopted a "totality of circumstances" approach for measuring when a ***Terry*** situation becomes custodial and triggers ***Miranda.*** *See* ***Pounds***, 176 Wis.2d at 322, 500 N.W.2d at 377. Still, Vertz's situation bears no resemblance to ***Pounds***. Vertz was never frisked, handcuffed or ordered to do anything. For the most part, he remained in the presence of his fellow campers. Although he and Goeb distanced themselves from the campers while she searched his tent, he volunteered to have this done. We therefore reject Vertz's claim that this investigatory setting somehow evolved into a custodial setting that triggered ***Miranda.***

Vertz also contends that the ***Terry***-like stop ended when the rangers confirmed that he was holding marijuana joints in his hand. At this point, Vertz argues that the rangers had probable cause to arrest him for marijuana possession and hence could not continue in their investigatory questioning.

This argument, however, rests on a misconstruction of ***Terry.*** Because ***Terry*** permitted law enforcement to conduct stop-and-frisk searches without probable cause, *see* ***Terry***, 392 U.S. at 30, Vertz seems to argue that ***Terry*** no longer applies once an officer has probable cause. But ***Terry*** does not mandate that a law enforcement officer automatically arrest a person once he or she determines that there is probable cause. Nor does ***Terry*** somehow prevent a law enforcement officer from conducting investigatory questioning of a person even though there is probable cause to arrest that person.

The decision to arrest is almost exclusively left to the discretion of the law enforcement officer. *See* § 968.07(1), STATS. ("A law enforcement officer *may* arrest a person when ....") (emphasis added); *but see* § 968.075(2), STATS. (describing mandatory arrest in domestic abuse situations). Indeed, even after a law enforcement officer has made a formal arrest, that officer has the discretion to release that person without further proceedings. *See* § 968.08, STATS. We thus reject Vertz's fundamental claim that the rangers were required to arrest him once they had probable cause to believe that he was in possession of marijuana.

In sum, we conclude that the two rangers conducted a ***Terry***-like investigatory stop of Vertz. Moreover, the stop remained investigatory until the point when he was formally arrested. And because Vertz was never subjected to custodial questioning, the ***Miranda*** requirements were never triggered. We

therefore reject the trial court's determination that Vertz should have been given those warnings.

By the Court.—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.